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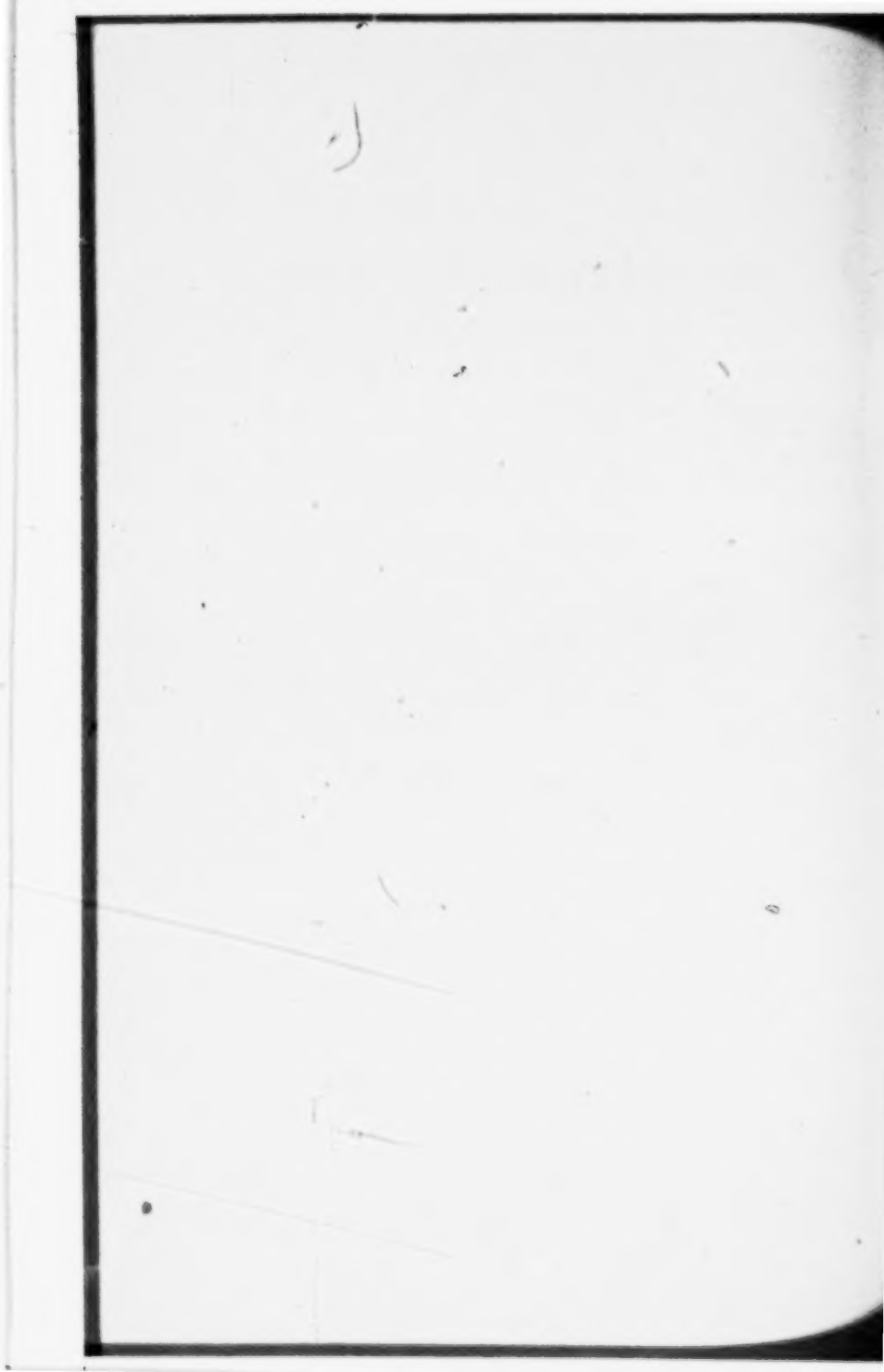
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 476

BLUE STAR AUTO STORES, INC., PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION, UNITED STATES DE-
PARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court (R. 53-55) are not reported. The opinion of the Circuit Court of Appeals (R. 88-91) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 10, 1947 (R. 92). A petition for rehearing was denied on October 28, 1947 (R. 93). The petition for certiorari was filed on December 11, 1947. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether employees in petitioner's central office and two warehouses, located in Chicago and serving a chain of twenty-one retail stores in Illinois and Indiana, are engaged in a "retail establishment" within the meaning of the Fair Labor Standards Act.

2. Whether employees in petitioner's central office and warehouses whose duties relate generally to the receipt and distribution of merchandise are engaged in interstate commerce or in the production of goods for interstate commerce within the scope of the Fair Labor Standards Act where over 20 percent of all merchandise is received from without the State, and where over 25 percent of all merchandise is subsequently shipped across State lines.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, are as follows:

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 13. (a) The [minimum wage and overtime] provisions * * * shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *.

STATEMENT

Petitioner, an Illinois corporation, owns and operates a chain of 21 auto supply and sporting goods stores, nine of which are located in Chicago, nine elsewhere in Illinois, and three in Indiana (R. 11). Petitioner also maintains three additional establishments in Chicago: a general office, which serves as the executive, administrative, purchasing, advertising, bookkeeping, and general accounting offices, and two warehouses, which are used to receive, store, and re-ship all goods purchased by petitioner and sold by it in its retail outlets (R. 11, 12, 24, 27, 53). It was stipu-

lated that slightly over 20 percent of all merchandise received at the warehouses was received from points located outside the State of Illinois, and that slightly over 25 percent of all merchandise received at the warehouses was distributed from the warehouses to the Indiana stores (R. 13-14).

There are about five employees in the general offices, including a bookkeeper, a pay roll clerk, and a switchboard operator (R. 11, 21-23). The bookkeeper keeps records of purchases, goods shipped to the retail outlets, and the income and expenditures of the outlets (R. 11). She also handles the accounts payable ledger and the general ledger showing the company's assets and liabilities (R. 11, 21, 23). The pay roll clerk takes care of the pay roll for the entire organization, including the preparation of pay checks for all of petitioner's employees, both within and without the State (R. 12). She also prepares the necessary Federal and State reports on pay rolls (R. 12). The switchboard operator handles all telephone calls, including the long-distance calls (R. 12, 44-45).

The warehouse employees include receivers, pricers, order pickers, packers, and shippers (R. 12-13, 36). The "receivers" unload the trucks and check the merchandise against the order (R. 28, 32, 35, 36). The "pricer" then affixes the proper price to each item, following which it is stored (R. 36, 38). When a retail store orders

goods from the warehouse, the "order pickers" select the merchandise from the stock, the "packer" packs it for distribution, and the "shipper" loads it on the truck (R. 12-13, 28-29, 36-37). In one of the warehouses these functions are combined and all the work is performed by four employees; in the other warehouse there are eight employees (R. 28-34). Incoming merchandise arrives at the warehouse several times a week, and outgoing shipments are made daily, including weekly shipments to Indiana stores (R. 32, 36, 38, 47). Some of the merchandise is shipped out of the warehouse as soon as it comes in, while other items are retained for longer periods of time (R. 12).

No attempt is made to segregate the work of the employees as between interstate and intrastate goods (R. 11-12, 21-23, 29, 37). Thus, the work of all the office employees relates to the Indiana stores, as well as to the Illinois stores, and to merchandise received from without the State, as well as to local goods (R. 11-12, 21-23). Similarly, the warehouse workers handle interstate and intrastate receipts and shipments (R. 28-29, 35-37). The witnesses testified that the employees devoted approximately 15 percent of their time to work related to the Indiana stores, apparently basing this estimate on the number of Indiana stores (R. 26, 37-41). As noted above, over 20 percent of the incoming merchandise came from without the State, and over 25 percent of all

the merchandise was subsequently shipped to Indiana (R. 12-13).

The District Court concluded that defendant's office and warehouse employees are engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of the Act (R. 55). Since petitioner had stipulated that it was not complying with the overtime provisions of the Act (R. 14), that court enjoined future violations (R. 56-57). The Circuit Court of Appeals affirmed the judgment with a minor modification not here material (R. 88-92), stating that "it is now well settled that warehouse and central office employees who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce" and that "the interstate activity of the employees involved is a regular recurring part of their work [and] * * * not casual or sporadic" (R. 90).

ARGUMENT

The issues raised in the petition were settled by this Court's decision in *Phillips Co. v. Walling*, 324 U. S. 490, holding that employees in the central office and warehouse of a two-State chain store system are "in the very midst of the stream of interstate commerce" (324 U. S. at 497) and are not engaged in an exempt retail establishment. The fact that petitioner may purchase less of its merchandise direct from manufacturers than did

the *Phillips Company* (see Pet., p. 13) affords no basis for distinguishing the *Phillips case*.¹ Each of petitioner's warehouses and its central office is "a distinct physical place of business" (324 U. S. at 496), none of which is engaged in making retail sales.² Since petitioner's employees worked indiscriminately on the substantial and regularly recurring interstate shipments to and from the warehouses, as well as on the receipt and distribution of local goods, there is plainly no merit to the argument that its warehouse and central office employees are not covered by the Act, or that their covered activities are "de minimis."³ See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, affirming 128 F. (2d) 395; *Borden*

¹ As a matter of fact the record in the *Phillips case* does not disclose the amount purchased by the *Phillips Company* direct from manufacturers. If, however, this consideration is material to the question whether chain store warehouses and central offices are retail establishments, petitioner's admission (Pet., p. 13) that nearly 40 percent of its merchandise is purchased directly from manufacturers would establish that it performs a substantial wholesale function.

² The suggestion that the retail establishment exemption, if applicable to department stores and not to petitioner's central office and warehouses, violates the Fifth Amendment merits no discussion. See *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, 184; *Steward Machine Co. v. Davis*, 301 U. S. 548, 584; *Currin v. Wallace*, 306 U. S. 1, 13-14; cf. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U. S. 412.

³ Petitioner states (Pet., p. 7) that less than 2 percent of each warehouse employee's time is devoted to shipments to Indiana. Under petitioner's mathematics, if there were 10 warehouse employees and 100 percent of the goods went to Indiana, each would be devoting only 10 percent of his time to such goods.

Co. v. Borella, 325 U. S. 679; cf. *Mabee v. White Plains Pub. Co.*, 327 U. S. 178.

Petitioner's final contention that violations were not sufficiently proved is foreclosed by its stipulation that it "is not now compensating, and has not compensated, its office and warehouse employees at the [overtime] rate * * * for hours worked in excess of [the statutory straight-time maximum] * * *" (R. 14), as well as by the absence from its Answer of a denial of the allegations of noncompliance contained in the Complaint. See R. 4-5, 7-8, and cf. Rules 8 (b) and 8 (d) of the Federal Rules of Civil Procedure.

CONCLUSION

The decision below is plainly correct. The petition presents no questions of substance not already settled by this Court and should, therefore, be denied.

Respectfully submitted.

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